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In the Supreme Court of the United States

73-1263

October Term, 1973

No. A-654

WILLIAM WILK, *et al.* and HARVEY SMITH, *et al.*,
Petitioners,

vs.

YELLOW FREIGHT SYSTEM, INC., *et al.*,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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In the Supreme Court of the United States

October Term, 1972

No. A-684

WILLIAM WILK, *et al.* and HARVEY SMITH, *et al.*,
Petitioners,

vs.

YELLOW FREIGHT SYSTEM, INC., *et al.*,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on October 17, 1972.

CITATIONS TO OPINIONS BELOW

The Memorandum Opinion and the Order Dismissing the Complaints of the United States District Court for the Northern District of Ohio, Eastern Division, printed in Appendix A, hereto, *infra*, p. 9, were not officially reported. The opinion of the Court of Appeals for the Sixth Circuit printed in Appendix B, hereto, *infra*, p. 22, was also not officially reported.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on October 17, 1972. Justice Potter Stewart granted an extension until March 16, 1973 to file Petition for Writ of Certiorari. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

Whether grievants affected by the interpretation and application of a collective bargaining agreement should be entitled to a fair and adequate hearing concerning their contractual rights.

Whether the United States District Courts under Section 301 of the Labor Management Relations Act of 1947, as amended, should upon request review the proceeding invoked by the parties for settling a dispute to determine whether the individuals affected by that proceeding received a fair and adequate determination of their contractual rights.

Whether the lack of opposition within the joint labor-management committee hearing a dispute, the neutrality of the statutory bargaining agent and the absence of notice to the affected employees breeds such a defect in the proceeding before the joint committee so as to render its decision invalid and necessitating an independent determination by a United States District Court of the dispute.

STATUTES INVOLVED

The statutory provision involved is Section 301 of the Labor-Management Relations Act of 1947, as amended, 61 Stat. 156, 29 U.S.C., Section 185(a), which states as follows:

> 185. Suits by and against labor organizations—Venue, amount, and citizenship
>
> (a) Suits for violation of contracts between an employer and a labor organization representing employees in and industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

The petition seeks a review of a judgment of the Court of Appeals for the Sixth Circuit affirming an order of the United States District Court for the Northern District of Ohio denying petitioners' Motion for Reconsideration of the Court's order granting the Motion to Dismiss of Defendant, Yellow Freight System, Inc. (Yellow Freight), and the Motions for Summary Judgment by Defendants, Truck Drivers Local Union 407 (Local 407), Joint Counsel 41, and Freight Drivers, Dockworkers and Helpers Local Union 24 (Local 24) and entering final judgment in favor of each of the Defendants.

Originally there were two separate cases which were consolidated pursuant to Rule 42 F.R.C.P. since both sought to have the determination of a joint area commit-

tee refusing to dovetail merging groups of employees from formerly separate companies set aside and an independent judicial determination of the seniority issue.

The dispute arises out of the acquisition by Yellow Freight of the Norwalk of Delaware Division of Norwalk Truck Lines Inc. (Norwalk) operating rights and other alleged assets in July, 1969. When temporary approval for the acquisition of the operating rights was granted by the Interstate Commerce Commission, Norwalk drivers were offered work opportunity at Yellow Freight's West Richfield, Ohio terminal.

Several months later, Yellow Freight closed its Cleveland, Ohio terminal and transferred its employees to the West Richfield, Ohio terminal. Ultimately, one seniority roster at the West Richfield terminal was established and in accordance with practice called "Ohio Past Practice" which had existed for many years until eliminated from the 1970-73 National Master Freight Agreement and Central States Area Over-the-Road Agreement, the Norwalk drivers were given a seniority date of July 14, 1969 for work purposes only. As a result, many Norwalk drivers who had more seniority than the Yellow Freight drivers were placed below Yellow Freight drivers on the seniority list. Such inferior position adversely affected these employees in relation to lay-off and job scheduling.

Grievances were filed by some of the Norwalk drivers contending that the merged seniority lists should have been dovetailed. The Joint Area Committee referred the matter to the Change of Operations Committee for a decision. The Change of Operations Committee, composed of an equal number of persons representing management and an equal number representing labor, heard the dispute on January 27, 1971. At least one grievant and all other employees which were to be affected by the de-

cision were not notified of the hearing. At the hearing, only one grievant was present along with a couple of other employees. Representatives from Local 407, the local union for both factions—Yellow Freight employees and Norwalk employees—urged a complete review of the situation but took no position opposing the merged seniority list or advocated a list which would be dovetailed. The Change of Operation Committee appeared neutral and unanimously denied the grievances and provided that "the Norwalk men are to be placed at the bottom of the Yellow Transit [SIC] Road Board effective 7/14/69 and shall carry a road seniority date of 7/14/69 for work purposes; however, their full company seniority date shall apply for fringes." It was from this decision that these suits were filed.

REASONS FOR GRANTING WRIT

1. A re-examination of the Court's decision in *General Drivers Warehousemen and Helpers Local Union 89 et al. v. Riss and Company Inc.*, 372 U.S. 517 (1963), and *Humphrey v. Moore*, 375 U.S. 335 (1964), is compelled by the number of cases involving the same issue being pursued in the lower courts. Although these decisions have been followed there are suggestions that there may be circumstances which create exceptions to their rulings. In addition, a re-examination is necessitated by the need to assure that persons affected by a dispute under a collective bargaining agreement receive a fair and impartial determination of their rights. The Court in *Humphrey v. Moore*, *supra*, at page 351, suggested that the parties be afforded a "proceeding *adequate* under the agreement." (Emphasis added)

The Court must review the proceeding followed by the parties to determine whether it was adequate. To

be adequate, the proceedings must be fair. Should the Court find the proceedings to be inadequate and unfair, it should find that the hearing and decision are invalid and, on its own, hear the issues and make an independent determination. Resort to remedies under the U.S. Arbitration Act, 9 U.S. Code Sec. 1-14; 61 Stat. 669, as amended, would not be available since Section 10 of that Act specifies the instances wherein an award may be vacated or modified and an inadequate and unfair hearing is not one of the grounds listed.

2. Criteria should be established for determining the adequacy of the grievance proceeding. These guidelines are essential for consistent determinations on that issue.

First, and foremost, to an adequate proceeding is the attitude of the grievant's statutory bargaining agent. Heretofore, the Court has established that the bargaining representative should avoid being arbitrary or act with hostile discrimination toward its members. Anything short of this conduct is classified as "fair representation". Oftimes, as in the case at bar, it is this theory that conflicts with a fair and adequate hearing, for the absence of an advocate in the grievance proceeding potentially destroys the possibility of revealing the ultimate truth to the issue involved. Clearly, the Union has the right not to pursue a grievance it feels lacks merit *Vaca v. Sipes*, 386 U.S. 171 (1967), but it logically follows that once the Union exercises its judgment to pursue an employee's grievance it must vigorously present that grievance as an advocate of the employee's position. There is no reason to require this representative of persons to conform to a duty much less than any other representative. Should the bargaining agent represent two opposing factions to a contractual dispute, it can, without liability in the excep-

tional case, choose which faction to represent. It may decide not to pursue the grievance of either group or, as in *Humphrey v. Moore, supra,* oppose one group over the other at the grievance hearing. However, once having selected to present the grievance of one side of the dispute, the Union's neutrality at a hearing on the grievance destroys the fundamental guarantees of the collective bargaining process for the employees who have, at this point, relied upon the Union to represent them.

Another element essential to an adequate hearing is the need for the opposition between the parties having some voice in the decision of the joint committee. See *Bieski v. Eastern Automobile Forwarding Company,* 396 F.2d 32 (3d Cir. 1968) wherein the Court questioned the reasonableness of the committee's decision in view of the "lack of essential opposition within the committee". In the case at bar, the transcript of the hearing before the committee fails to reflect any opposition within that committee.

Lastly, inherent to an adequate hearing is the necessity of notice to the person or persons affected by the ultimate decision and the privilege of attending the hearing deciding their contractual rights. The lack of notice to the employees has been deemed sufficient to invalidate an arbitration award that determines seniority rights, *Estes v. Union Terminal Company,* 89 F.2d 768 (5th Cir. 1937). See also *Peterson v. Building Service Employees,* New York Supreme Court 1968 (70 LRRM 2048).

CONCLUSION

A writ of certiorari should issue to review the judgment of the Court of Appeals for the Sixth Circuit so as to establish effective ground rules to protect rights of employees at grievance hearings.

Respectfully submitted,

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APPENDIX A

Copies of Findings, Conclusions and Orders of United States District Court for the Northern District of Ohio Eastern Division

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

HARVEY SMITH, *et al.*,
Plaintiffs,
v.
YELLOW FREIGHT SYSTEM, INC., *et al.*,
Defendants.

MEMORANDUM
Case No. C71-592

WILLIAM WILK, *et al.*,
Plaintiffs,
v.
YELLOW FREIGHT SYSTEM, INC., *et al.*,
Defendants.

MEMORANDUM
Case No. C71-1056

(Filed March 27, 1972)

GREEN, *J.*:

These lawsuits arise from a 1969 purchase of operating rights by Yellow Freight System, Inc. from United Buckingham Freight Lines. The matter at issue between the parties pertains to seniority rights to be accorded the employees of the consolidated operation who were formerly employed by United Buckingham.

In Civil Action No. C71-592 the plaintiffs are "over the road or line haul drivers". In Civil Action No. C71-1056 the plaintiffs are "city men and dockworkers". The parties are in agreement that both cases present the same issues regarding the seniority question.

Plaintiffs contend that the establishment of a merged seniority list on a "terminal, or change of operations" basis rather than on a "dovetailing" basis is in violation of the terms of the collective bargaining agreement controlling thereon. Such collective bargaining agreement is composed of a National Master Freight Agreement and a supplement thereto, the Central States Area Over-the-Road Supplemental Agreement with Ohio Rider. In the context of this case there are two such agreements involved, one covering the period 1967-1970 and the second covering 1970-1973.

The plaintiffs' claims against Yellow Freight are predicated upon alleged breaches of the collective bargaining agreements governing on seniority rights. The claims against the union defendants are based upon alleged breaches of the duty of fair representation in the prosecution of certain grievances under the collective bargaining agreements arising from the seniority dispute.

Each of the defendants has moved for summary judgment. The motion of defendant Yellow Freight goes to the merits, whereas the motions of defendants Joint Council No. 41 and Local Union No. 24 are primarily predicated upon the proposition that they are no part of the dispute which gives rise to these actions.

From the pleadings and affidavits submitted on behalf of defendants Joint Council No. 41 and Local Union No. 24 it appears that their motions are well taken, and that they are entitled to be dismissed as parties herein.

This leaves for consideration plaintiffs' claims against defendants Yellow Freight and Local 407.

With regard to the claim asserted against defendant Local 407, the Court is of the opinion that it must fail for two reasons.

First, the cause of action attempted to be asserted therein may only be maintained based upon arbitrary, discriminatory or bad faith actions of the collective bargaining agent. *Vaca v. Sipes,* 386 U.S. 171 (1967). The Sixth Circuit Court of Appeals has held that a complaint alleging such a breach must contain more than conclusory statements, and must state facts reflecting an attitude of "hostile discrimination". *Balowski v. UAW,* 372 F.2d 829 (CA 6, 1967). The instant complaints do not meet those standards.

Were the Court inclined to overlook the pleading deficiency, the record clearly requires a finding that Local 407 did not breach its duty of fair representation. Considering the unrebutted affidavits and exhibits, it appears therefrom that the said defendant pursued the grievances presented to it in a reasonable and proper manner.

This leaves for consideration the plaintiffs' claim against defendant Yellow Freight. There can be no argument that the substance thereof, and the relief sought, are the same as was presented for administrative determination under the grievances filed by three of the plaintiffs. The said grievances were filed in late 1970 and early 1971. They were presented to the Joint Area Committee, which referred them to the Change of Operations Committee for the Central States Joint Area Committee. A hearing was held before that latter body on January 27, 1971, and a decision rendered basically upholding the company's position.

The motion for summary judgment of defendant Yellow Freight is predicated on the contention that under the collective bargaining agreements seniority disputes are subject to handling under the grievance procedures thereof. It is then contended that as to those plaintiffs who filed grievances there has been an administrative decision which is conclusive, and that as to those plaintiffs who did not file grievances they may not resort to the courts by reason of the failure to exhaust administrative remedies.

There is an aspect of this dispute which has not been given specific consideration by the parties which has been of some concern to the Court.

As previously noted, there are two collective bargaining agreements involved. The acquisition of the United Buckingham operating rights by Yellow Freight and the initial consolidation of operations took place while the 1967-1970 agreement was in effect. However, it appears that the final establishment of the merged seniority rosters occurred when the 1970-1973 agreement was in effect, and the three grievances were filed after its effective date.

The parties have not considered the effect of this overlapping of the relevant period between the two contracts. While the contract provisions pertinent to this action are basically the same, there are some differences in particular clauses, and the parties have relied upon some of the varying clauses in support of their positions.

It appears to the Court that such situation is governed by Article 8(F) of the 1970-1973 agreement which provides that:

> All local, area, and national grievance committees as constituted under this agreement shall have the juris-

> diction and power to decide grievances which arose under the preceding agreements and supplements thereto, applying, however, the contract under which the grievance arose.

The reasonable interpretation of that clause is that any grievance filed during the term of the 1970-1973 contract is controlled by the procedural provisions thereof, whereas the substance is controlled by the terms of the contract under which the dispute arose. However, in the Court's opinion it is not necessary to determine the controlling nature of Article 8(F), in that the Court believes that the same ultimate conclusion is dictated under either contract.

Article 5 of both National Master Freight Agreements pertains to "Seniority Rights". Under both contracts it was provided that in the case of an acquisition such as is involved herein seniority lists should be "dovetailed" upon the grant of permanent authority by the Interstate Commerce Commission. Both articles also provided, however, that:

> Area and/or State Committees created pursuant to Local Supplements which have previously established rules of seniority, not contrary to the provisions of such Supplements, and approved by the Joint Area Committee, may continue to apply such rules if such rules are reduced to writing. Article 5, Section 3(a)(8).

While there are seniority clauses in both Supplemental Agreements, the terms thereof are of a general nature and not specifically directed to the situation of an acquisition and consolidation, which is governed by Article 5 of the National Master Agreements.

Pursuant to Article 5, section 3(a)(8), there had been reduced to writing prior to July 14, 1969 a seniority provision known as the "Ohio Past Practice". That proviso, in pertinent part, was:

> The established Ohio Past Practice is that employees of the purchased Company are placed on the bottom of the Seniority List of the purchasing Company. . . .

The "Ohio Past Practice" was in effect at the time of the purchase of the United Buckingham operating rights by Yellow Freight. It was rescinded as a part of the 1970-1973 contract negotiations, and terminated as of the April 1, 1970 effective date of the said agreement.

Article 8 of both national agreements covers the subject of "National Grievance Procedure". Each provides that:

> All factual grievances or questions of interpretation arising under the provisions of the Supplemental Agreement (or factual grievances arising under the National Master Agreement) shall be processed in accordance with the grievance procedure of the applicable Supplemental Agreement.

It thus becomes necessary to consider the terms of the Supplemental Agreements regarding grievances.

In the 1967-1970 Supplemental Agreement the subject of "Grievance Machinery Committee" is covered in Article 42 and the subject of "Grievance Machinery and Union Liability" is covered in Article 43. In the 1970-1973 agreement the same subjects are covered in Articles 44 and 45.

Each contract, under the subject of "Grievance Machinery Committee", provides for the creation of certain

committees, including a Joint Area Committee, and that "all committees established under this Article may act through sub-committees duly appointed by such committee." In the 1970-1973 agreement it is further provided in Article 44 that "all decisions of the Committees and subcommittees shall be final and binding".

The "Grievance Machinery and Union Liability" articles of both contracts, insofar as pertinent to these actions, contain identical language. Each provides that:

> Disputes shall first be taken up between Employer and the Local Union involved. Failing adjustment by the parties, the following procedures then apply:
>
> * * * * *
>
> (b) Where a Joint State Committee is unable to agree or come to a decision on a case, it shall, at the request of the Union or the Employer involved, be appealed to the Joint Area Committee at the next regularly constituted session. Where the Joint Area Committee by majority vote settles a dispute such decision shall be final and binding on both parties with no further appeal.

There is one other relevant contract provision cited by the parties, being Article 5, section 7, of both contracts. While the specific language of the two clauses is not the same, the import thereof is. Each recognizes that questions containing seniority may arise which are not specifically covered by the terms of Article 5. It is provided in both contracts that in such case the parties involved "may mutually agree to such disposition of the seniority problems as in their judgment is appropriate under the circumstances". The 1967-1970 agreement concludes with the provision that:

> The Change of Operations Committee under the Local Supplements or the National Master Agreement shall have the authority to add to or modify these rules in specific situations presented to them.

The 1970-1973 agreement concluded with the provision that:

> The Change of Operations Committee provided for in the National Master Freight Agreement or the Supplemental Agreements shall have the authority to determine the establishment and application of seniority in those situations presented to them. In all cases the seniority decisions of the Joint Committees, including Change of Operations Committees and Subcommittees, established by the National Master Freight Agreement and the respective Supplemental Agreements shall be final and binding.

It is well settled that if the parties to a collective bargaining agreement have agreed to submit their disputes to administrative procedures the courts will not intervene until such procedures have been exhausted, other than to determine whether the matter is within the scope of such agreement. *United Steel Workers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). It is also settled that if the parties have agreed that such administrative determination is to be conclusive on the merits the courts may not reconsider the same. *General Drivers Local 89 v. Riss & Co.*, 372 U.S. 517 (1963). Those principles have consistently been applied in this circuit. See, *Chambers v. Beaunit Corp.*, 404 F.2d 128 (CA 6, 1968); *Hill v. Aro Corp.*, 275 F. Supp. 482 (D.C. N.D. Ohio, 1967).

In the Court's opinion the subject matter of this action is subject to the administrative procedures of the collective bargaining agreements. The dispute clearly in-

volves a question arising under Article 5 of the National Master Freight Agreements: Was the company entitled to invoke the "Ohio Past Practice" under Article 5, Section 3(a)(8), rather than "dovetailing" seniority pursuant to Article 5, Section 3(a)(1).

Plaintiffs do not appear to seriously question the fact that the dispute arises under the seniority provisions of the agreements and is subject to the administrative procedures thereof. The principal thrust of their argument appears to be that the Change of Operations Committee was not the proper forum for the adjudication, and that any decision of the Change of Operations Committee is not conclusive on the merits.

The Court cannot agree with either of such contentions.

Under both collective bargaining agreements, Joint Area Committees are authorized to act through subcommittees. That being so, reference of this dispute to the Change of Operations Committee by the Joint Area Committee is within the contemplation of such agreements.

As to the conclusive nature of the decision of the Change of Operations Committee, if the Court is correct as to the effect of Article 8(F) of the 1970-1973 agreement there can be no argument whatsoever that such decision is final and binding. It is provided therein that decisions of duly appointed committees and subcommittees generally are final and binding (Article 44), and specifically provided that decisions on seniority by a Change of Operations Committee or Subcommittee is final and binding (Article 5, section 7).

In arguing against the conclusive effect of the administrative decision plaintiffs rely on the language of Article

5, section 7 of the 1967-1970 agreement which, while granting a Change of Operations Committee jurisdiction to adjudicate seniority disputes, does not specify that seniority decisions of a Change of Operations Committee are final and binding.

However, the 1967-1970 agreement, under Articles 43 and 42, provides that a grievance decision of a Joint Area Committee is final and binding, and authorizes a Joint Area Committee to delegate its authority to act to a duly appointed subcommittee. In the Court's opinion the combination of those two contract provisions requires the conclusion that the ruling of a duly appointed subcommittee, which would include a Change of Operations Committee, on a grievance properly referred to it for hearing and decision by the Joint Area Committee must be accorded recognition as final and binding. That rationale would apply herein.

Applying the rules of law found to govern these actions to the facts thereof, it follows that as to those plaintiffs who filed grievances the Court may not review the administrative determination. As to those plaintiffs who did not file grievances, the Court may not assume jurisdiction over the subject matter of their suit by reason of their failure to exhaust administrative remedies. Consequently, defendant Yellow Freight is entitled to entry of summary judgment in its favor.

Orders will be entered in accordance with the terms of this memorandum.

/s/ BEN C. GREEN

United States District Judge

Case No. C71-1056

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

WILLIAM WILK, *et al.*,
Plaintiffs,

v.

YELLOW FREIGHT SYSTEM, INC., *et al.*,
Defendants.

ORDER

(Filed March 27, 1972)

UPON CONSIDERATION of the motion of defendant Yellow Freight System, Inc. to dismiss the complaint (the same being treated as a motion for summary judgment), the motion for summary judgment of defendant Truck Drivers Local Union 407, the motion for summary judgment by defendant Joint Council No. 41, and the motion for summary judgment by defendant Freight Drivers, Dockworkers and Helpers Local Union Number 24,

IT IS HEREBY ORDERED that each of the said motions is granted, and final judgment is entered in favor of each of the said defendants dismissing the plaintiffs' complaint.

/s/ BEN C. GREEN
United States District Judge

Case No. C71-592

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

HARVEY SMITH, *et al.*,
Plaintiffs,

v.

YELLOW FREIGHT SYSTEM, INC., et al.,
Defendants.

ORDER

(Filed March 27, 1972)

UPON CONSIDERATION of the motion of defendant Yellow Freight System, Inc. to dismiss the complaint (the same being treated as a motion for summary judgment), the motion for summary judgment of defendant Truck Drivers Local Union 407, the motion for summary judgment by defendant Joint Council No. 41, and the motion for summary judgment by defendant Freight Drivers, Dockworkers and Helpers Local Union Number 24,

IT IS HEREBY ORDERED that each of the said motions is granted, and final judgment is entered in favor of each of the said defendants dismissing the plaintiffs' complaint.

/s/ BEN C. GREEN
United States District Judge

Case No. C71-592

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

HARVEY SMITH, *et al.*,
Plaintiffs,

v.

YELLOW FREIGHT SYSTEM, INC., *et al.*,
Defendants.

ORDER

(Filed April 12, 1972)

UPON CONSIDERATION of plaintiffs' motion for reconsideration of the Court's judgment of March 27, 1972,

IT IS HEREBY ORDERED that the said motion is denied.

/s/ BEN C. GREEN
United States District Judge

APPENDIX B

Copy of Order of United States Court of Appeal For the Sixth Circuit

No. 72-1592

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM WILK, *et al.*,
Appellant,

v.

YELLOW FREIGHT SYSTEM, INC., *et al.*,
Appellee.

HARVEY SMITH, *et al.*,
Appellant,

v.

YELLOW FREIGHT SYSTEM, INC., *et al.*,
Appellee.

ORDER

(Filed October 17, 1972)

Before: McCREE, MILLER and KENT, Circuit Judges.

This case having been assigned by the Chief Judge to this panel pursuant to Rule 3(e) of the Rules of this Court and upon consideration of the record in the light of *Robert Morris, et al. v. Werner-Continental, Inc.*, No. 71-2044, decided September 20, 1972, and for the reasons

stated in the memorandum opinion of United States District Judge Ben C. Green, it appearing to the satisfaction of the Court that the issues presented are so unsubstantial as not to need further argument,

Now, therefore, IT IS ORDERED that the judgment of the District Court be and it is hereby affirmed.

ENTERED BY ORDER OF THE COURT

/s/ JAMES A. HIGGINS
Clerk